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CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1943

No. 850

ORANGE THEATRE CORPORATION,
a corporation

Petitioner

vs.

HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF

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Supreme Court of the United States

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No. .....

ORANGE THEATRE CORPORATION,
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vs.

HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Orange Theatre Corporation, a corporation, created and existing under and by virtue of the Laws of the State of New Jersey, with its principal office in the City of Newark, New Jersey, respectfully shows:

A

Summary Statement of the Matter Involved [1]

This is an application for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit to review a judgment dated January 10, 1944 (Supp. App. 11) affirming two orders of the United States District Court for the District of New Jersey,[2] the first of which extended the respondents' time to assert their objection to venue and the second of which dismissed the complaint against them because of improper venue (App. 124, 125).

Petitioner brought this suit in the United States District Court for the District of New Jersey, under the Federal Anti-Trust Laws (15 U. S. C. A., Sect. 1, *et seq.*) to recover treble damages and to enjoin further violations of said Statutes (App. 12, 18).

Pursuant to the Court's order for process (App. 1, 7, 12, 18), the five defendants-respondents were served in New York City and Brooklyn, New York, by their respective local United States Marshals on the following dates:— Harry Brandt, David Weinstock and Benjamin Weinstock, were served on October 17, 1940 (App. 7, 12); Emanuel Hertzig and J. Joshua Goldberg were served on October 18 and 21, 1940, respectively (App. 7, 12).

On November 7, 1940 (after the expiration of the time to answer of the respondents Harry Brandt, David Weinstock and Benjamin Weinstock),[3]—all five respondents—obtained a written stipulation from plaintiff extending

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1. Page references "App." are to the Appendix of the record used in the Circuit Court of Appeals, 10 copies whereof have been filed with this petition for Certiorari.

Page references "Supp. App." are to supplemental record containing decision and judgment of Circuit Court of Appeals.

2. Both orders were entered on April 26, 1943 (App. 124, 125).

3. Rule 12 (a) of the Federal Rules of Civil Procedure affords a defendant 20 days to serve his answer. Since the defendants, Harry Brandt, David Weinstock and Benjamin Weinstock were served on October 17, 1940, their time to answer expired on November 6, 1940.

their time to "answer or otherwise move with respect to the complaint" until November 22, 1940 (App. 4). By a similarly worded written stipulation dated November 22, 1940, the time was further extended to November 25, 1940 (App. 5).

Both of these stipulations were entitled in the cause, and were signed by the "attorney for the defendants (respondents)" and were duly filed with the Clerk of the District Court (App. 1, 13). There is nothing in these stipulations from which to infer that the appearances of the respondents were under protest, or limited to challenging the venue or jurisdiction over the person, or that they had any objection whatsoever to the venue or jurisdiction or that they desired to reserve their privilege of objecting to same.

On November 25, 1940, the five respondents served a joint motion to dismiss the complaint on the ground of improper venue[1] (App. 6).

By an opinion filed November 6, 1941 and reported in 2 F. R. D. 278 (App. 7-10), District Judge Walker sustained the respondents' motion; and by order dated November 17, 1941 he dismissed the complaint as to the respondents (App. 11).

Petitioner promptly appealed to the Circuit Court of Appeals for the Third Circuit. The matter was argued before a three-judge court; but because of the importance of the questions raised, the Court ordered a reargument before the entire court *en banc*.

In an opinion filed on August 6, 1942 (reported in 130 F. 2d 185), the Circuit Court of Appeals reversed the order appealed from (App. 12-17). It held that under the Rules of Civil Procedure, the stipulations were ineffective to extend the respondents' time to answer or move against the complaint; that under Rule 6(b), the District Judge was without power to extend the respondents' time to

1. The attorney for respondents admits that his original motion was based on "objection to *venue*" (App. 20, Par. 8).

make said motion, in the absence of proof of "excusable neglect;" that since the respondents failed to make their *venue* objection within time, they lost that objection, and were in default entitling petitioners to the entry of default under Rule 55(a), the entry of which was a "purely formal matter" (App. 12-17). In its opinion, the Circuit Court of Appeals intimated that after the case was remanded, the respondents might "apply to the trial judge to be permitted to answer under Rules 55(c) and 60(b)" (App. 16).

The mandate of the Circuit Court of Appeals filed August 26, 1942 (App. 24) "ORDERED, ADJUDGED and DECREED * * * that the order of the said District Court be and the same is hereby *reversed* with costs."

On August 17, 1942, respondents' attorney applied, ex-parte, to District Judge Fake,[1] and obtained an injunctive order restraining petitioner from entering a default judgment, and directing it to show cause why the respondents should not be permitted to renew their motion notwithstanding the reversal by the Circuit Court of Appeals (App. 17-23).

On the return of that order to show cause (September 14, 1942), Judge Fake entered a Rule of Reversal which adjudged that the order of Judge Walker made on November 17, 1941 *"be and the same is hereby vacated, set aside, and for nothing holden; that the complaint be reinstated as against the said defendants, * * * and that the cause be restored to the trial list"* (App. 46-47).

The minutes of that hearing show that Judge Fake denied the respondents' application to renew their motion addressed to venue (App. 35, 43), but granted their oral motion to file an "answer" in the express language of the opinion of the Circuit Court of Appeals (App. 41, 42, 43, 44, 102). That respondents' attorney fully understood Judge Fake's ruling is indicated by his statement on the record (App. 41) that he was to prepare an order

1. Judge Walker had resigned in the meantime.

giving him "20 days within which to *respond* to the complaint." The minutes further show that Judge Fake admonished respondents' attorney that if he asserted the defense of improper *venue* in his answer "the chances are a hundred to one" that he would strike it out on motion (App. 43). The attorneys left with the understanding that respondents' attorney was to prepare an order in accordance with Judge Fake's ruling and submit it to petitioner's attorney for approval (App. 40, 102).

On September 15, 1942, respondents' attorney appeared before Judge Fake, ex-parte, while he was engrossed in writing an opinion (App. 63), and obtained his signature to an order which not only extended respondents' time to answer, but also gave them leave to renew their motion (App. 47).

Petitioner promptly moved to vacate or modify that order (App. 48-53). Judge Fake opened his order pending his decision on the motion (App. 62, 63, 92, 124).[1]

After argument, Judge Fake called for briefs (App. 93), which were filed. Seven months later (April 17, 1943), he filed an opinion (App. 101-104) in which he sustained the form of the order dated September 15, 1942. He thereupon on April 26, 1943 entered the two orders. The *first* ordered "that the order made on September 15, 1942, which was opened for the purpose of said motion, be and is now made the order of this Court *as of the 26th day of April, 1943,* and that the plaintiff's motion to vacate, or in the alternative, to modify the same, is hereby denied" (App. 124). The *second* order again dismissed the complaint against the respondents, in the exact language of the former order made by Judge Walker, which

1. On the argument (September 28, 1942) he said:

"Well to be perfectly frank about it, I was in the midst of writing an opinion here in which my mind was more on that opinion than it was on this order, and it may well be that I signed something more than the opinion that I had given before" (App. 63).

was reversed by the Circuit Court of Appeals (App. 125-126, 11).

The record shows that Judge Fake was troubled about the construction of the opinion of the Circuit Court of Appeals (App. 27). In the course of the arguments before him, he suggested that an application be made to the Circuit Court of Appeals for a Writ of Mandamus addressed to him, in order to clarify what he regarded as an ambiguity in its opinion (App. 27, 37, 62 (bottom), 64, 69, 79, 82). He made the order of dismissal in the identical language of Judge Walker's order to make it clear that he wanted to put the record in the same condition as it was before Judge Walker and to raise the same issues as were before the Circuit Court of Appeals on the first appeal, in order that the opinion of that Appellate Court be clarified (App. 120, 121, 122, 37, 33, 34, 68, 69, 78, 79).

Petitioner thereupon took a second appeal to the Circuit Court of Appeals to give effect, and to enforce the mandate of the Circuit Court of Appeals on the first appeal. *Litchfield* v. *Dubuque Pacific R. Co.*, 7 Wall. 270; 19 L. Ed. 150; *Re Blake*, 175 U. S. 114, 44 L. Ed. 94; *In re Potts*, 166 U. S. 263, 41 L. Ed. 994.

The second appeal came on before a three-judge court, which again ordered that the cause be argued before the entire court *en banc* (Supp. App. p. 1).

On January 10, 1944 the Circuit Court of Appeals filed a decision affirming the orders appealed from on the following grounds (Supp. App. 3-10):

1. The Circuit Court of Appeals admits that both in the District Court and on both appeals, the parties and all the courts treated the respondents' motion as raising only the defense of improper venue; that treating the objection as one of venue, their former decision reversing the District Court was correct, and the respondents lost their objection to venue by not asserting it seasonably (Supp. App. 4, 6).

2. That their further study has convinced them that the defense which the respondents sought to assert was not that of improper venue, but rather want of jurisdiction over their persons; that so treating the motion they are forced to conclude that the respondents' motion was not served out of time and should be sustained, unless that objection was waived by their voluntary appearance in the District Court; that although this objection was not urged in the District Court or on either of the appeals, they had a duty to consider it (Supp. App. 5, 6).

3. That the stipulations amounted to a voluntary appearance in the action, which gave the Court power to adjudicate the controversy against them. *Placek* v. *American Life Ins. Co.*, 288 Fed. 983 (D. C. Washington, 1923); that prior to the adoption of the Rules of Civil Procedure such a voluntary appearance operated as a waiver of any objection to the jurisdiction over the person; but that under the new Rules, such voluntary appearance does not operate as a waiver of such objection (Supp. App. 7, 9). The Court arrived at this conclusion on the premise that the new Rules had abolished the age-old distinction between general and special appearances (Supp. App. 8). According to the decision of the Circuit Court of Appeals a person may challenge the jurisdiction of the Court over his person even after he has voluntarily and generally appeared in the case.

The order of the Circuit Court of Appeals for the Third Circuit, affirming the judgments or orders last mentioned, was entered on January 10, 1944.

B

Jurisdiction

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed, is January 10, 1944.

2. The jurisdiction of this Court to issue the writ of certiorari herein prayed for, is invoked under Judicial Code, Sect. 240(a), as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Sect. 347).

3. Petitions for certiorari have been granted in the following cases involving issues analogous to those at bar: *Barnards* v. *Johnson,* 314 U. S. 19, 86 L. Ed. 11 (involving important question of appellate practice); *Freeman* v. *Bee Machine Co.,* 319 U. S. 448, 87 L. Ed. 1509 (involving question of venue); *Letulle* v. *Scofield,* 308 U. S. 415, 84 L. Ed. 355 (where a Circuit Court of Appeals decided a case on a point not raised by the parties).

C

The Questions Presented

This case presents the following questions:

1. May a Circuit Court of Appeals depart from and refuse to enforce its reversing decision and mandate on a former appeal, in the same cause, and between the same parties,—upon a second appeal which seeks to enforce such former decision and mandate?

2. May a defendant challenge the jurisdiction of a District Court over his person after he has entered a voluntary or general appearance in the cause?

3. Have the Rules of Civil Procedure abolished the age old distinction between general and special appearances?

4. May a Circuit Court of Appeals *sua sponte* raise and decide a point which was neither urged by the parties nor considered by the Court below, and thus place its decision on a ground contrary to the theory adopted by the parties and the Court below, and contrary to the law of the case as settled by the same Appellate Court on a former appeal?

5. Under the Rules of Civil Procedure (Rules 12 (b), (g), (h)), if a defendant has two objections, one, of improper venue, and the second, lack of jurisdiction over his person, and he only urges the venue objection, which is decided against him,—has he waived the objection of lack of jurisdiction over his person?

6. Where a defendant, after entering an appearance, moves to dismiss a complaint because of improper venue, upon facts which give rise to an objection to venue as well as an objection to lack of jurisdiction over his person, —may he assert the latter objection after the time to answer has expired and after the venue objection has been decided against him?

D

Reasons for the Allowance of the Writ

1. The decision of the Circuit Court of Appeals for the Third Circuit on the second appeal, is, in effect, a repudiation, nullification, and reversal of its decision and mandate on the first appeal. It did by indirection that which it could not have done directly because its term

had expired.[1] *Re National Park Bank of New York*, 256 U. S. 131, 65 L. Ed. 863, 864. Its refusal to adhere to and enforce its first decision and mandate is a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

2. The decision of the Circuit Court of Appeals for the Third Circuit, that under the Rules of Civil Procedure a defendant may challenge the jurisdiction of the Court over his person *after* entering a voluntary or general appearance, is revolutionary and in conflict with the following applicable decisions of this Court. *Pollard* v. *Dwight*, 8 U. S. 421, 2 L. Ed. 666, 669; *Toland* v. *Sprague*, 37 U. S. 300, 330, 9 L. Ed. 1093, 1105; *Kendall* v. *U. S.*, 37 U. S. 524, 623; 9 L. Ed. 1181, 1220; *Jones* v. *Andrews*, 10 Wall. (U. S. 327, 19 L. Ed. 935; *Shelton* v. *Tiffin*, 6 How. (U. S.) 163, 186, 12 L. Ed. 387, 397; *Creighton* v. *Kerr*, 20 Wall. (U. S.) 8, 12 L. Ed. 309, 310; *Cooper* v. *Reynolds*, 10 Wall. (U. S.) 308, 19 L. Ed. 931, 932; *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26.

3. The decision of the Circuit Court of Appeals for the Third Circuit that the Rules of Civil Procedure have abolished the age old distinction between general and special appearances is in conflict with the applicable decision of this Court and the other Circuit Courts of Appeal which have held that the new Rules merely changed the procedure and not substance, and that the new Rules merely abolished the labels "general" or "special", but did not affect the substance of such appearance. *Jackson* v. *Heiser*, 114 Fed. 2d 310, 312 (C. C. A., 9th); *Carter* v. *Powell*, 104 Fed. 2d 428 (C. C. A., 5th), rehearing denied 104 Fed. 2d 1012, cert. denied 308 U. S. 611, 84 L. Ed.

1. Rule 3 of the Rules of the Third Circuit Court of Appeals provides that "One term of the Court shall be held annually commencing on the first Monday of October."

511; *Cf.* Rule 82 of Federal Rules of Civil Procedure; Cleveland Institute Proceedings (1938), pp. 188, 242; Washington D. C. Institute Proceedings (1938), p. 231; *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479; *U. S.* v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1058; *Davis* v. *Davis, supra; Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 87 L. Ed. 1509.

4. The Circuit Court of Appeals for the Third Circuit by deciding the second appeal upon a ground not urged or raised by the parties (lack of jurisdiction over the person),[1] either before it or the court below, has departed from the accepted and usual course of judicial proceedings that an appellate court will not decide a case upon a question neither raised nor argued. *Letulle* v. *Scofield*, 308 U. S. 415, 84 L. Ed. 355; *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 80 L. Ed. 154.

5. The Circuit Court of Appeals for the Third Circuit, in deciding the second appeal on the ground that the respondents' objection was to the Court's jurisdiction over their person, and not over venue, overlooked Rule 12 (b), (g), (h) of the Rules of Civil Procedure, which provides that where a litigant has several objections or defenses and urges only one of them, he is deemed to have waived the other objections. *Carter* v. *Powell*, 104 Fed. 2d 428 (C. C. A. 5th); rehearing denied 104 Fed. 2d 1012; cert. denied 308 U. S. 611, 84 L. Ed. 511; *Cf. Nakdimen* v. *Baker*, 111 Fed. 2d 778, 782 (C. C. A. 8th).

6. The decision of the Circuit Court of Appeals for the Third Circuit that the respondents had to assert their venue objection before their time to answer expired,—whereas, notwithstanding their *appearance*, they could assert their objection of lack of jurisdiction over them even after their time to answer had expired—makes

1. The Circuit Court of Appeals admits that throughout the litigation the respondents argued "*venue*" and not lack of jurisdiction over the person.

an artificial, impractical, and erroneous distinction between these objections and contrary to Rule 12(b) and (h) of the Rules of Civil Procedure. Both objections arise out of the same operative facts; both relate to the convenience of litigants, and, as such, are personal privileges which they may waive. Even before the adoption of the Rules of Civil Procedure, the decisions of this Court and other Circuits treated both types of objections alike and as one and the same. *Cf. Blank* v. *Bitker*, 135 Fed. 2d 962 (C. C. A. 7th) with *Camp* v. *Gress*, 250 U. S. 308, 63 L. Ed. 997, 1000; *Macon Grocery Co.* v. *Atlantic Coast Line R. Co.*, 215 U. S. 501, 510, 54 L. Ed. 300, 304; *Seaboard Rice Milling Co.* v. *Chicago R. I. & P. R. Co.*, 270 U. S. 363, 70 L. Ed. 633, 634. This conflict should be settled by this Court.

7. This case involves important questions touching the powers and duties of the Circuit Courts of Appeal of the United States, and the binding effect of their decisions, and other important questions relating to procedure in civil cases, which should be settled by this Court.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; that the judgment of the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court; that the orders of the United States District Court for the District of New Jersey be reversed by this Honorable Court; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and meet.

ISRAEL B. GREENE,
of Counsel with Petitioner.

Supreme Court of the United States

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ORANGE THEATRE CORPORATION,
a corporation,

Petitioner.

vs.

HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(Emphasis and the like, ours, unless otherwise indicated. Reference "App." refers to Appendix of record in Court below. Reference "Supp. App." refers to Supplemental Appendix.)

I

Opinions of the Court Below

The decision of the Circuit Court of Appeals for the Third Circuit under challenge was filed January 10, 1944, is reported in 139 Fed. 2d 871 and is set forth in full in the Supplemental Appendix pp. 3 to 10.

The opinion of the Circuit Court of Appeals, on the first appeal was filed on August 6, 1942, is reported in 130 Fed. (2d) 185, and is fully set forth in the Appendix pp. 12 to 17.

The first opinion of the District Court is reported in 2 F. R. D. 278 (Walker, *D. J.*), and is fully set forth in the Appendix pp. 7 to 10. The second opinion of the District Court (Fake, *D. J.*), is fully set forth in the Appendix pp. 101-104.

II

Statement of the Case

A full statement of the case has heretofore been given under heading "A" in the petition, and in the interest of brevity the statement will not be repeated in the brief.

III

Specification of Errors

The specification of errors is substantially the same as the reasons of the petition for the allowance of the writ set forth in the petition and may be condensed as follows:

1. The Circuit Court of Appeals for the Third Circuit erred in departing from and refusing to adhere to and enforce its decision and mandate on the first appeal, which became the law of the case. In effect, the Circuit Court of Appeals reversed its former decision after the expiration of the term.

2. The Circuit Court of Appeals erred in holding that under the Rules of Civil Procedure, a defendant may challenge the jurisdiction of the court over his person, after entering a voluntary or general appearance. This is revolutionary and in conflict with the applicable decisions of this Court.

3. The Circuit Court of Appeals erred in holding that the Rules of Civil Procedure abolished the age old distinction between general and special appearances. This ruling is in conflict with the decisions of this Court, and other Circuit Courts of Appeal which have held that the new Rules merely eliminated the labels, but not the substance of such appearances.

4. The Circuit Court of Appeals erred in deciding the second appeal upon the ground of lack of jurisdiction over the person, which ground was not raised or urged by the parties, either before it or the District Court.

5. The Circuit Court of Appeals erred in deciding the second appeal on the ground of lack of jurisdiction over the respondents' persons, since that ground, if any, was waived by the respondents.

6. The Circuit Court of Appeals erred in holding that the respondents, notwithstanding their appearance, could assert the objection of lack of jurisdiction over them, even after their time to answer had expired.

IV

ARGUMENT

POINT I

The Court below erred in departing from and refusing to adhere to and enforce its decision and mandate on the first appeal which became the law of the case. In effect, it reversed its former decision after the expiration of the term.

The record shows that District Judge Fake was in doubt about the construction of the first decision of the Circuit Court of Appeals (App. 27), and asked petitioner's counsel to apply for a Writ of Mandamus to clarify that opinion (App. 27, 37, 62, 79, 82). In dismissing the complaint Judge Fake made an order in the identical language of the first order of dismissal, because he wanted the record to be in the same condition as it was on the first appeal, so that the Circuit Court of Appeals would have precisely the same issue before it (App. 120, 121, 122, 37, 33, 34, 68, 69, 78, 79). Thus the second appeal

was, in essence, an application for a writ of mandamus to enforce its earlier mandate. In such a situation the law gives a litigant a choice of remedy. He may proceed either by mandamus or appeal. The granting of such a writ would have resulted in a vacation of Judge Fake's orders. *Re Potts*, 166 U. S. 263, 41 L. Ed. 994; *Litchfield v. Dubuque & Pacific R. Co.*, 7 Wall. 270, 19 L. Ed. 150; *In re Blake*, 175 U. S. 114, 44 L. Ed. 94.

Now since on the first appeal the Circuit Court of Appeals held that the respondents had lost their objection to venue, and since Judge Fake admittedly misconstrued that reversal and again dismissed on the ground of venue, it was the clear duty of the Circuit Court of Appeals, on the second appeal, to have reversed Judge Fake's orders. Instead, it affirmed him, and thus in effect, repudiated and nullified its first decision. Thus all the time consumed, and all the work and expense invested in prosecuting the first appeal to a successful conclusion, has been rendered nugatory by the refusal of the Circuit Court of Appeals to stand by its earlier decision. In effect, the Circuit Court of Appeals *sua sponte* reversed itself after the expiration of the term, when it had lost jurisdiction over its first decision. *Re National Park Bank of New York*, 256 U. S. 131, 133, 65 L. Ed. 863, 864.

It is settled by a long and consistent line of decisions that whatever propositions of law are decided by an Appellate Court, become the law of the case, and the same Court cannot on a second appeal in the same case, consider new issues or re-examine or reconsider its former decision. The first decision is the law of the case and must control its later decision. This doctrine results from the rule that the decisions of an Appellate Court are conclusive upon the parties, and that the Appellate Court, like a *nisi prius* court, is powerless to revise or review its own judgments after the lapse of a term at which they are rendered, except in a case of fraud. Otherwise litigation would be endless, and judgments would be unstable.

Washington Bridge Company v. *Stewart*, 3 How. (U. S.) 413, 11 L. Ed. 658; *Supervisors* v. *Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Clark* v. *Keith*, 106 U. S. 464, 27 L. Ed. 302; *Sibbald* v. *United States*, 12 Pet. (U. S.) 488, 9 L. Ed. 1167; *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 40 L. Ed. 414; *Thompson* v. *Maxwell Land Grant & R. Co.*, 168 U. S. 451, 42 L. Ed. 539; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 41 L. Ed. 810 at 813. This rule has been recognized by our Third Circuit Court of Appeals in *A. S. Kreider Co.* v. *United States*, 117 Fed. 2d 133, 135 (reversed on other grounds, 313 U. S. 443, 85 L. Ed. 1447), and has been consistently followed by all Circuit Courts of Appeal; *Souer* v. *DeBary*, 105 Fed. 293 (C. C. A., 5th); *Woodruff* v. *Yazoo and M. V. R. Co.*, 222 Fed. 29 (C. C. A., 5th); *Alabama etc. R. Co.* v. *Carroll*, 84 Fed. 772, 777 (C. C. A., 5th); *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 106 Fed. 2d 891 (C. C. A., 8th); *Balch* v. *Haas*, 73 Fed. 974 (C. C. A., 8th); *Mohrenstecker* v. *Westervelt*, 87 Fed. 157 (C. C. A., 8th); *Thatcher* v. *Gottlieb*, 59 Fed. 872 (C. C. A., 8th); *Mutual Reserve etc. Life Ass'n* v. *Beatty*, 93 Fed. 747 (C. C. A., 9th).

It is respectfully submitted that the action of the Circuit Court of Appeals in the case at bar, is such a serious departure from ordinary appellate procedure as to warrant interference by this Court. In *Bernards* v. *Johnson*, 314 U. S. 19, 86 L. Ed. 11, this Court granted certiorari to review an important question of appellate practice. The case at bar presents a more serious, a more important, and a more far reaching question than was involved in the *Bernards* case, since here the action of the Circuit Court of Appeals strikes at the very foundation of the doctrines of *res adjudicata* and *stare decisis*.

POINT II

The Court below erred in holding that under the Rules of Civil Procedure, a defendant may challenge the jurisdiction of the Court over his person, after entering a voluntary or general appearance. This is revolutionary and in conflict with the applicable decisions of this Court.

The ruling of the Circuit Court of Appeals that the respondents can challenge the jurisdiction of the District Court over their person, after entering a voluntary or general appearance, is revolutionary, and in conflict with the following decisions of this Court: *Pollard* v. *Dwight*, 8 U. S. 421, 2 L. Ed. 666, 669; *Toland* v. *Sprague*, 37 U. S. 300, 330, 9 L. Ed. 1093, 1105; *Kendall* v. *U. S.*, 37 U. S. 524, 623; 9 L. Ed. 1181, 1220; *Jones* v. *Andrews*, 10 Wall. (U. S.) 327, 19 L. Ed. 935; *Shelton* v. *Tiffin*, 6 How. (U. S.) 163, 186, 12 L. Ed. 387, 397; *Creighton* v. *Kerr*, 20 Wall. (U. S.) 8, 12, 22 L. Ed. 309, 310; *Cooper* v. *Reynolds*, 10 Wall. (U. S.) 308, 19 L. Ed. 931, 932; *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26.

It is believed that this is the first case which has squarely held that under the Rules of Civil Procedure an objection to jurisdiction over the person is not waived by a voluntary or general appearance. Unless the question is set at rest by the authoritative decision of this Court, the lower courts will henceforth be beset with interminable litigation over objections to venue, as well as objections to jurisdiction over the person, because the reasoning of the Circuit Court of Appeals also supports the contention that objections to venue are not waived by a voluntary or general appearance. *Cf. Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 87 L. Ed. 1509 with *Bland* v. *Bitker*, 135 Fed. 2d 962 (C. C. A., 7th).

Moreover, the Circuit Court of Appeals overlooked that, in essence, the stipulations between the parties were contracts by the respondents to plead to the merits, and not

to raise any objection to the jurisdiction over the person. Since the Court cites and relies upon *Placek* v. *American Life Ins. Co.,* 288 Fed. 987 (D. Ct., Wash.) as authority for the proposition that the stipulations constitute a voluntary or general appearance, the language of that decision is pertinent to the contractual nature of the stipulations. There the Court said at page 988:

> "It (extension of time) also amounted to an implied agreement with plaintiff that defendant would plead to plaintiff's complaint and reserved no right to attack the process, service of jurisdiction over the person of the defendant. By such action on the part of the defendant, it waived any right to * * * challenge the jurisdiction over aught but the subject matter."

To the same effect see *Brookings State Bank* v. *Federal Reserve Bank,* 291 Fed. 659 (D. Ct., Oreg.).

In *Freeman* v. *Machine Company, supra,* this Court granted certiorari to settle a troublesome question of venue. It is respectfully submitted that the question here presented, viz., whether under the New Rules of Civil Procedure an objection of lack of jurisdiction over the person is waived by a general or voluntary appearance, is equally important.

The two cases cited and relied on by the Circuit Court of Appeals (*Kaufman* v. *United States,* 35 Fed. Supp. 900 (D. C. Dist. Col.); and *Blank* v. *Bitker,* 135 Fed. 2d 962 (C. C. A., 7th)), are distinguishable from the case at bar. The *Kaufman* case was decided by a District Court. Its decision should be disregarded for three reasons. *First,* because its holding that the New Rules of Civil Procedure apply to an action under the Tucker Act, was overruled in *Lynn* v. *United States,* 110 Fed. 2d 586 (C. C. A., 5th) and *United States* v. *Sherwood,* 312 U. S. 584, 85 L. Ed. 1058; *second,* because the questions agitated in this case, and particularly the contractual nature of the stipulations,

were not raised or decided therein. (The opinion in the *Kaufman* case is meager, and does not critically examine the subject); and *third*, because that ruling is contrary to the principles underlying the later decision of this Court in *Freeman* v. *Bee Machine Company, supra.* At most, the opinion in the *Kaufman* is *dicta.*

In *Blank* v. *Bitker, supra,* the defendant's conduct "was within the scope of the procedure outlined in Rule 12 (b)," which in express language states that the defense of lack of jurisdiction over the person and improper venue may be pleaded with other defenses without waiver. For this reason, the Court held that he did not waive his objection to venue. In that case, Bitker did *not* enter a voluntary or general appearance *before* answer. The Court points out that "on the motion the * * * plaintiff's only contention was that the taking of the deposition and answering, constituted a general appearance, and a waiver of the venue defense." 135 Fed. 2d 962. The discussion in the *Bitker* case shows the conflict in the cases and the controversial nature of this question.

It is important to note that the *Bitker* case was decided on June 10, 1943, and that it does not cite or discuss the decision of this Court in the *Freeman* case, *supra,* decided on June 1, 1943. It is apparent that the *Freeman* case was not brought to the attention of the Court in the *Bitker* case.

POINT III

The Court below erred in holding that the Rules of Civil Procedure abolished the age old distinction between general and special appearances. This ruling is in conflict with the decisions of this Court, and other Circuit Courts of Appeal which have held that the new rules merely eliminated the labels, but not the substance of such appearances.

The opinion of the Circuit Court of Appeals reaches the conclusion that a voluntary or general appearance does not waive jurisdiction over the person, by the *rationale* that general and special appearances were abolished by the Rules of Civil Procedure, and that therefore the Rules "call for the use of * * * restraint on the part of the Federal Courts in the exercise of their power over a defendant who has voluntarily appeared to defend an action against him but who desires also to raise a jurisdictional defense" (Supp. App. 8).

This conclusion, we think, is in conflict with the recent decision of this Court in *Freeman* v. *Bee Machine Co., supra* (1943), where this Court recognized the existence of "general appearances", and that an objection to venue may be waived by entering a general appearance.

In our view, all that the Rules of Civil Procedure accomplished was to abolish the "label" of appearances, but it did not abolish the substantive law of general and special appearances. *Jackson* v. *Heiser,* 111 Fed. 2d 310, 312 (C. C. A., 9th). This is recognized by Rule 82, which provides that:

> "These rules shall not be construed to extend or limit the *jurisdiction* of the District Courts of the United States, or the *venue* of actions therein."

In *Melekov* v. *Collins,* 30 Fed. Supp. 159 at 160 (D. Ct. Cal.), the Court said:

> "Rule 82, which is * * * part of the scheme of the modernized procedure in civil actions in the federal

> courts * * * is a definite statement that the long-established and well-settled principles of *substantive rights* of civil litigants remain intact."

At the Cleveland Institute Proceedings (1938, p. 188) Chairman Mitchell of the Advisory Committee, said:

> "Jurisdiction and venue are uneffected. That is stated in Rule 82, but the Rule is surplussage because the *jurisdiction* and *venue* are matters of *substantive law,* and not proper pleading, practice or procedure."

To the same effect see Chairman Mitchell's remarks at Washington, D. C., Institute (1938, p. 231), and *Sibbach* v. *Wilson,* 312 U. S. 1, 85 L. Ed. 479; *U. S.* v. *Sherwood,* 312 U. S. 584, 85 L. Ed. 1058.

During the Cleveland Institute (1938), Chairman Mitchell in answering the question whether a special appearance was required, stated (at p. 242):

> "Now under the new system you do not have to label an appearance as general or special. * * * The Supreme Court has said, that the nature of an appearance depends on the essence of what you are asking for, and not the label you are attaching to it." (Obviously referring to the case of *Davis* v. *Davis,* 305 U. S. 32, 83 L. Ed. 26.)

Now all that Rule 12(b) accomplished was to make a change in the prevailing *mechanics* for asserting an objection to venue or jurisdiction over the person. Under the old practice an objection to venue or jurisdiction over the person had to be asserted *before* answer, by a motion *limited* to that objection, frequently labelled a "special appearance". But even under the old practice the label "special appearance" was unnecessary because the name or label of the appearance did not matter; rather it was the limited nature of the motion or relief sought, which gave character to the appearance. *Davis* v. *Davis,*

305 U. S. 32, 83 L. Ed. 26. Under the old practice if the defendant asserted an objection to venue or jurisdiction over his person, with his answer, or other motion to the merits, he was deemed to have waived his objection, or "special appearance." The spirit of the New Rules, however, is to preserve such objection or "special appearance", when properly asserted by answer or by motion before answer. Looking at the problem from a procedural standpoint, all that the New Rules did was merely to add another method for asserting such an objection.

But the fact that the New Rules furnished a second method for asserting such an objection, did not destroy the settled *substantive* law of general and special appearances; nor did they take away from the parties the right to appear voluntarily, or waive, or bargain away such an objection, either by actually entering a general appearance, or by entering into a contract or stipulation amounting to a general appearance. True, the New Rules do not mention general or special appearances by name; but for that matter, neither do the Practice Acts in most states of the United States. The substantive law relating to general and special appearances, like the substantive law of a "fee simple" is still part of our fundamental law.

That the New Rules did not destroy the substantive law relating to general and special appearances was held by the Fifth Circuit Court of Appeals in *Carter* v. *Powell*, 104 Fed. 2d 428, reh. denied 104 Fed. 2d 1012; certiorari denied 308 U. S. 611, 84 L. Ed. 511, and was again recognized by this Court, in *Freeman* v. *Bee Machine Co., supra.*

Now since the law of general and special appearances is still with us, and has not been changed by the New Rules, it follows that where a party has once entered a voluntary or general appearance, he has thus cut the bridges behind him and cannot retrace his steps. To put it in another way, once he enters the Court, he has closed the door behind him and submits to the jurisdiction of the Court over his person. Now since the fundamental

law of appearances has not been changed by the New Rules, the decisions before the New Rules (*Jones* v. *Andrews*, 10 Wall. (U. S. 327, 19 L. Ed. 935; *Placek* v. *American Life Ins. Co., supra; Brookings State Bank* v. *Federal Reserve Bank, supra*), are applicable. If before the New Rules a voluntary or general appearance operated to waive objections to the jurisdiction over the person, the same rule applies now and the respondents have waived any objections to jurisdiction over their persons.

POINT IV

The Court below erred in deciding the second appeal on the ground of lack of jurisdiction over the person, which ground was not raised or urged by the parties either before it or the District Court below.

It is fundamental that an Appellate Court will not consider or decide questions which are not raised before it, or which are not raised below; yet here that is precisely what the Circuit Court of Appeals did. Despite the fact that the parties, and the two District Judges below, have at all times treated the question as one of venue, and despite the fact that the decision of the Circuit Court of Appeals on the first appeal was rested upon that premise, yet, on the second appeal, it departed from that theory of the case, and from its own former decision, which was the law of the case, and decided the appeal on a point neither raised nor argued before it nor before the court below.[1]

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1. The respondents in their Appellees' Brief before the Circuit Court on the second appeal, gave the following statement of the questions involved on the appeal.

"STATEMENT OF QUESTIONS INVOLVED

1. Under the opinion and mandate of this Court on the former appeal (130 F. 2nd 185) did the District Court (the stipulations having been declared void) not have the power under the Rules of Federal Procedure and especially Rule 60 (b), to extend the individual defendant's time to move with respect to the complaint and then to entertain and grant their motion to dismiss the complaint because of improper *venue?*"

Such a departure from established principles of appellate law should be supervised by this Court.

In *Letulle* v. *Scofield*, 308 U. S. 415, 84 L. Ed. 355, this Court granted certiorari to review a decision of a Circuit Court of Appeals, which had decided a case on a point not raised or litigated by the parties. To the same effect see *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200; 80 L. Ed. 154.

POINT V

The Court below erred in deciding the second appeal on the ground of lack of jurisdiction over the respondents' persons, since that ground, if any, was waived by the respondents.

The Circuit Court of Appeals seems to have felt constrained to "treat the motion * * * as raising the defense of lack of jurisdiction over the person" (Supp. App. 6) despite the fact that "Both in the District Court and upon appeal the parties treated the motion only as raising the defense of improper venue" (Supp. App. 4, 5).

We respectfully submit that there was not such constraint upon the Circuit Court of Appeals. We think it was error for them to have changed the theory of respondents' objection from venue (upon which the parties and the District Judges, and the Circuit Court of Appeals had proceeded throughout the litigation), to one of lack of jurisdiction over their person.

Assuming that the respondents had objections to improper venue and lack of jurisdiction over the person, their failure to assert the latter, operated as a waiver under Rule 12 (b), (g), (h) of the Rules of Civil Procedure, *Carter* v. *Powell, supra; cf. Nakdimen* v. *Baker*, 111 Fed. 2d 778, 782 (C. C. A., 8th). Hence there was no constraint upon the Circuit Court of Appeals to raise and decide the question of alleged lack of jurisdiction over the person.

POINT VI

The Court below erred in holding that the respondents, notwithstanding their appearance, could assert the objection of lack of jurisdiction over them, even after their time to answer had expired.

The Circuit Court of Appeals concedes that the respondents lost their objection to venue, because they did not assert it before their time to answer expired (Supp. App. 4). They hold, however, that this reasoning does not apply to the objection of lack of jurisdiction over their persons, even though they entered a general appearance in the case.

We respectfully submit that the distinction drawn by the Court is artificial, impractical and contrary to the spirit of Rule 12(b) and (h) of the Rules of Civil Procedure. Here, both objections arise out of the same operative facts; both relate to the convenience of litigants, and as such are personal privileges which the respondents may waive. Even before the adoption of the Rules of Civil Procedure, the decisions of this Court and other Circuits treated both types of objections alike and as one and the same. *Cf. Blank* v. *Bitker*, 135 Fed. 2d 962 (C. C. A., 7th) with *Camp* v. *Gress*, 250 U. S. 308, 63 L. Ed. 997, 1000; *Macon Grocery Co.* v. *Atlantic Coast Line R. Co.*, 215 U. S. 501, 510, 54 L. Ed. 300, 304; *Seaboard Rice Milling Co.* v. *Chicago R. I. & P. R. Co.*, 270 U. S. 363, 70 L. Ed. 633, 634; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167.

The conflict in these cases should be settled by this Court.

Conclusion

This case involves one of the most troublesome questions in the administration of the anti-trust laws. There is hardly an anti-trust case in which the question of venue or lack of jurisdiction over the person is not raised. Litigation over these questions causes great delay. In the

case at bar, this phase of the litigation has consumed three years, during which time the trial of the case has been delayed.

Apart from these questions, and the applicability thereto of the Rules of Civil Procedure, which should be put at rest by this Court, a more serious issue in the case concerns the stability of the judgments of our Circuit Courts of Appeal.

Our entire appellate system rests upon the concept that a decision of an Appellate Court of competent jurisdiction constitutes the law of the case, which the lower court must obey; that if it fails to abide by the superior judgment, the Appellate Court will compel obedience to its mandate; and that once an Appellate Court has spoken and remanded the cause, it may not change that result, even though it may be erroneous, particularly after the expiration of the term. It is upon the faith of these well established rules of judicial decision that the public relies in seeking relief in the courts.

We respectfully submit that in the case at bar these fundamental rules of judicial decision have been departed from, in that the Circuit Court of Appeals has denied enforcement to petitioner's rights which were adjudicated on the first appeal, and thus the petitioner has ended up with a pyrrhic victory.

We therefore respectfully urge that a Writ of Certiorari be granted in this case to review and correct the judgment of the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

ISRAEL B. GREENE,
Of Counsel with Petitioner.

(26)

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 850

ORANGE THEATRE CORPORATION, a corporation,
Petitioner,

vs.

HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

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A

Statement

In this case, five individual defendants were joined with several corporate defendants in a suit for treble damages and an injunction under the Sherman and Clayton Acts. The corporate defendants did not raise any objection or any jurisdictional questions and are now before the Court on their answers. The individual defendants are the only persons involved in the present litigation.

Before expiration of time of the individual defendants to answer or appear, stipulations were entered into by counsel for each side extending the time of the individual

defendants to answer or otherwise move with respect to the complaint. These stipulations reserved all rights of the said defendants. Counsel for the petitioner, on page 3 of his brief, says, "There is nothing in these stipulations from which to infer that the appearances of the respondents were under protest or limited to challenging the venue or jurisdiction over the person, or that they had any objection to the venue or jurisdiction, or that they decided to reserve their privilege of objecting to same." The converse of the situation is also true. When counsel for the petitioner signed his name to the stipulation and extended the time, he made no reservations to the effect that the operation of the stipulations was to be limited to what he now insists was the effect of the stipulations. When the plaintiff's attorney signed these stipulations, he did not impose any strictures or reservations upon the operation and effect of the stipulations. These stipulations gave no greater right, and none was asked for, than to respond to the complaint as permitted by the Federal Rules of Civil Procedure in all of their parts. When it is remembered that under Rule 12 of the Rules of Civil Procedure, a defendant may join the defense of lack of jurisdiction over the person and improper venue with his answer all in the one pleading, or initiate it by preliminary motion, the difficulty complained of falls, and this application becomes frivolous and must and should be denied in every event since only a question of interlocutory practice is before the Court.

Furthermore, in the earlier decision in the Circuit Court of Appeals in this case, now the law of the case (130 Federal 2nd, 195) these stipulations were held to be void and of no effect. On the remand of the record to the District Court, time was given to the defendants to renew their motion under Rule 6B so that the motion eventually was made as contemplated by the Rules and the additional time was given, not by stipulation, but by order, and obviously if the stipulations not having had Court sanction were void on the part of the defendants, they were void on the part

of the plaintiff for the same reason. Thus it is apparent that this is a frivolous application.

We should also like to call attention to the comment on behalf of counsel for the petitioner as to what the Circuit Court of Appeals decided on the First Appeal, contained at the foot of page 3 and at the top of page 4 of the petitioner's statement of facts in his brief before this Court. This statement is not at all consonant with the actual situation. It is true that the Circuit Court of Appeals reversed the order of the District Court, but the actual judgment is to be read in the light of the Opinion as the judgment was reversed and the case was remanded for further proceedings not inconsistent with this Opinion. Under the authority of the case of *Rogers* v. *Hill*, 289 U. S. 582, a reversal for proceedings in accordance with the opinion makes the opinion a part of the mandate. The Court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests. On reversal, the opinion of the Court is clearly a series of instructions to the Court below as to what is to be done in the further development of the case.

The record below was encumbered with a reprint of all of the stenographic minutes of all of the arguments before District Judge Fake (App. pp. 27 to 123), which we believe are not a proper part of this record. What the District Court Judge had in his mind on a certain day or days, is unimportant. A court reviewing error is only interested in the orders, judgments, decrees, signed by the Court, and its opinions, so that whether Judge Fake was disturbed or troubled from time to time by the various arguments, as indicated on pages 4, 5 and 6 of petitioner's application here, is immaterial. In the argument before the Circuit Court of Appeals for the Third Circuit, on the last hearing, counsel for the appellant endeavored to use these minutes but was promptly told by Judge Biggs, President Judge of the Court, that the minutes were no part of the proceedings before the Circuit Court of Appeals. We find that they are offered as part of the record on the present

application for writ of certiorari. We have no doubt that this Court, in determining whether it should review and allow the writ, is not interested in the running argument between counsel and the Court in the District Court of the United States for the District of New Jersey. The comments of counsel for the petitioner, at the foot of page 6 and on all of page 7, as to what the Circuit Court of Appeals concluded in its opinions on either or both of the appeals, needs no comment here. Both of the opinions are before the Court and speak for themselves.

B

Jurisdiction

It is submitted that no substantial question is raised by this Appeal. There is no constitutional question involved or introduced anywhere in the record of this case. No substantial rights are decided. The Circuit Court of Appeals, in its last decision, review of which is sought here, concludes with the following important statement. "The dismissal of the complaint in such a situation, however, results solely from the lack of jurisdiction of the Court and is, therefore, not an adjudication of the merits of the cause of action. Consequently such a dismissal does not prejudice the right of the plaintiff to file another complaint when and if it appears that the Court may obtain jurisdiction over the person of the defendant" (Supplemental Appendix, p. 10). We have not been able to find a single instance where a review has been allowed under the law and facts such as appear in the instant case and we respectfully submit that the authorities relied upon by counsel in the third paragraph of this petition for a writ of certiorari, under Section B, marked Jurisdiction, and found on page 8, have no bearing on this case.

The petitioner first relies on *Bernards* v. *Johnson*, 314 U. S. 19, 62 Sup. Ct. Rep., p. 30. In this case (314 U. S., p 19 at p. 20), Mr. Justice Roberts, in the opening part of his opinion, says, "We took this case because it presents im-

portant questions of appellate practice under Section 75 of the Bankruptcy Act."

Freeman v. *Bee Machine Company*, 319 U. S. p. 448, 63 Sup. Ct. Rep. 1146, was a case arising on the question of removal of causes and whether or not a Federal Court, to which a case was removed, had full jurisdiction, the same as it would have had had the action originally been brought there, as distinguished from the limited jurisdiction of the State Court to allow amendments, the proceedings having originated in the State Court.

In *LeTulle* v. *Scofield*, 308 U. S. 415 at p. 421, 60 Sup. Ct. Rep. 313 at p. 316, Mr. Justice Roberts, writing for the Court said, "We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants which the petitioner never had an opportunity to meet by the production of evidence. The Court affirmed the decision below stating that the respondent or appellee may urge any matter appearing in the record in support of a judgment but he may not attack it even on grounds asserted in the Court below in an effort to have this Court reverse it when he, himself, has not sought review of the whole judgment or of that portion which is adverse to him." Clearly when these three cases are closely examined, it is made manifest that the issues involved in them or any one of them are not similar or analogous to the issues involved in the case at bar.

C

Answer to the Alleged Questions and Points Presented

Point I

The Court below, in its decision and mandate on the second appeal, made no departure from its decision and mandate on the first appeal, neither did it reverse its former decision in term or after the expiration of the term. The

issues before the Court on the second appeal were entirely different from the record as presented on the first appeal.

Point II

There was nothing revolutionary in the Courts' holdings that under the Rules of Civil Procedure, a defendant may challenge the jurisdiction of the Court over his person as a part of his answer filed under Rule 12. The revolution, if any, was occasioned by the adoption of the Rules of Civil Procedure and not by any interpretation put thereon by the Circuit Court of Appeals for the Third Circuit.

Point III

There was no error in the Courts' holding that the Rules of Civil Procedure abolished the age old distinction between general and special appearances. This ruling is not in conflict with the decisions of this Court and the decisions of other Circuit Courts of Appeal, which still hold, and correctly so, that while the right to enter a special appearance may be waived, the waiver must be voluntary. Waiver cannot and may not be invoked against a party and he cannot be said to have lost his right to object when, on the contrary, he has stoutly resisted jurisdiction from the very beginning.

Point IV

The Court below was not in error in deciding the second appeal on the ground of lack of jurisdiction over the person regardless of whether that particular ground was raised or urged by the parties, either before it or the Court below, the applicable principle being one which is well established in our law; namely, that a respondent or an appellee may urge any matter appearing in the record in support of a judgment (*LeTulle* v. *Scofield*, 308 U. S. 415 at page 421, 60 Sup. Ct. Rep. 313 at p. 316).

Point V

The Court below, in deciding the second appeal, reached its conclusion because of the fact that these defendants had stoutly resisted the jurisdiction of the Court "in limine" and had not waived their right to object to being brought into the District Court of the United States for the District of New Jersey, when served in the Southern and Eastern Districts of New York in a suit under the Sherman Anti Trust Act and the Clayton Act.

Point VI

There was no error in the holding below, in finding that the objection to jurisdiction over them was properly asserted, since the record before the Circuit Court of Appeals for the Third Circuit, on the second appeal, showed that proper objection had been raised before the District Court in accordance with the rules of the Court and in accordance with the practice outlined by the Circuit Court of Appeals when the case was before them on the first appeal.

D

Conclusion

It is respectfully submitted that the petitioner for the writ hopes that by tossing into the offing a lengthy record, encumbered with minutes, running argument before the District Court Judge, studded with decisions which we respectfully submit have no bearing on the issues involved, he may attract the Court's eyes to something which will give him a review here and a review which he is not entitled to have. The constitutionality of the Rules of Civil Procedure is not under attack. The decision of the Circuit Court of Appeals is not a final adjudication as to the merits of the controversy as the Circuit Court of Appeals clearly pointed out in its last opinion (Supplemental Appendix, p. 10). The petitioner cannot successfully urge before this Court as a proposition of law, that under Rule 12 one may not urge the jurisdictional objection either by motion be-

fore answer or in the answer itself. What petitioner does say is that under the facts in the instant case, these defendants lost their right, because of the stipulations which were entered into, to assert this important defense but the Circuit Court of Appeals, on the first appeal, practically struck the stipulations from the record and found that they were void and pointed the correct way of having time extended under the rules. Acting under the opinion of the Circuit Court of Appeals on the first appeal, these defendants applied to the District Court for their extension in the manner in which they should have applied in the first instance. It will be noted that the petitioner does not state that the District Court Judge abused his discretion by allowing these defendants an opportunity to renew their motion regardless of the stipulation and he could not successfully raise this as the Circuit Court of Appeals in the first appeal clearly found that counsel on both sides misapprehended the effect of their proposed stipulations. The law and the rules of the Court are clear. Counsel on both sides were in error in trying to stipulate additional times without a court order. That feature of the case disappeared when the record was remanded to the District Court. The Circuit Court of Appeals on the second appeal sustained the conduct of the District Court Judge in allowing further time to renew the motion.

The questions which were determined by the Circuit Court of Appeals for the Third Circuit are not within the compass of Rule 38 of the Revised Rules of the Supreme Court of the United States, Section 5, and especially Subsection B. The Circuit Court of Appeals for the Third Circuit did not render a decision in the instant case in conflict with the decision of another Circuit Court of Appeals on the same matter; it did not decide an important question of local law in a way probably in conflict with applicable local decisions; it did not decide an important question of Federal Law which had not been but should be decided by this Court; it did not decide a Federal question in a way

probably in conflict with applicable decisions of this Court, it did not so far depart from the accepted and usual course of judicial proceedings or so far sanction such a departure by a lower court as to call for an exercise of this Court's power of supervision. It applied fixed rules of law and the rules of Civil Procedure to the facts which it had before it and against it must be pointed out that there was no adjudication of the substantive rights of these parties.

There has been no final determination as to whether or not these individuals or any of them are liable in treble damages under the Sherman Act and Clayton Act and whether an injunction should pass against them, which is the relief sought in the complaint.

It is accordingly submitted that for all of the reasons above set forth, petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit, should be denied.

Respectfully submitted,

Milton C. Weisman,
Of Counsel with Respondents,
1450 Broadway,
New York City 18, New York.

(27)

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1943

No. 850

ORANGE THEATRE CORPORATION,
a corporation

Petitioner

vs.

HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG

Respondents

PETITIONER'S REPLY BRIEF

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

ISRAEL B. GREENE
Of Counsel with Petitioner
1180 Raymond Boulevard
Newark 2, New Jersey

Supreme Court of the United States

October Term, 1943

No. 850

ORANGE THEATRE CORPORATION,
a corporation

Petitioner

vs.

HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG

Respondents

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(Emphasis and the like, ours, unless otherwise indicated. Reference "App." refers to Appendix of record in Court below. Reference "Supp. App." refers to Supplemental Appendix.)

1

We have compared respondents' brief side by side with our brief, and have matched point for point, and argument for argument, and we respectfully submit that respondents' brief has evaded discussing the merits of our application for a Writ of Certiorari.

In our main brief, we argued six principal reasons for the allowance of the writ, which we documented by specific references to the record, and supported by numer-

ous authorities. Our adversary's answer consists of mere naked denials of our reasons, without any attempt to support these denials, and without any attempt to answer our authorities. This "technique" is reminiscent of the Shakespearean couplet:

> "I have no other but a woman's reason:
> I think him so because I think him so."

2

It is to be noted that the respondents appear in this Court by new counsel. It is therefore not surprising that their brief contains a number of misstatements of fact and assertions, contrary to the record and the decision of the Circuit Court of Appeals below.

At page 1 of their brief the respondents say that the stipulations extending their time to answer, etc. were entered into *before* the expiration of their time to answer. This is not in accord with the record. Three of the five respondents had already defaulted when the first stipulation was entered.[1]

At page 2 of their brief they make the bold statement that the Circuit Court of Appeals below held that the stipulations were "void". That statement is contrary to the opinion of the court below. The Circuit Court of Appeals said that the stipulations were "ineffective" to extend the time. (Supp. App. 4; see also App. 16).

---

1. Rule 12(a) of the Federal Rules of Civil Procedure affords a defendant 20 days to serve his answer. As is pointed out in the opinion of the Circuit Court of Appeals (Supp. App. 3-4) the defendants, Harry Brandt, David Weinstock and Benjamin Weinstock were served on October 17, 1940. Consequently their time to answer expired 20 days thereafter, or on November 6, 1940. The first stipulation extending the time of these defendants was not entered until November 7, 1940 (App. 4) or *one* day *after* their time to answer had expired.

The respondents' objection (page 3 of their brief) to the inclusion in the record here of the stenographic transcript of the proceedings before the District Court below, is inconsistent with the position they took before the Circuit Court of Appeals, and in any event, it is without merit.[1] They never filed any objections to the record on appeal. In their printed brief (page 4) filed with the Circuit Court of Appeals, the then counsel for the respondents said:

> "It was our first notion to move to delete all of the stenographic minutes as not constituting a proper or necessary part of the record on appeal. WE HAVE CONCLUDED TO LET THEM STAND * * *"

Counsel's statement (on page 3) that the Circuit Court of Appeals criticized the inclusion of the stenographic transcript referred to, is untrue.

3

The respondents cite *Letulle* v. *Scofield*, 308 U. S. 415 at 421, 84 L. Ed. 355 at 360 for the proposition that on appeal, any party may urge any matter appearing in the record in support of the judgment, and hence the Circuit Court of Appeals had a right to affirm on grounds different from the reasoning of the District Court and the Circuit Court of Appeals on the first appeal. A careful reading of the *Letulle* case will show that the rule therein enunciated does not apply to the case at bar. What the *Letulle* case holds is that where a lower court decides a question correctly, but assigns a wrong reason, the correct reason may on *direct appeal from the judgment*, be urged

1. The record on appeal before the Circuit Court of Appeals (which has been docketed in this court) includes the stenographic transcript of the proceedings before the District Court. Under Rule 75(b) of the Rules of Civil Procedure an appellant (petitioner herein) is afforded the right to include in his designation of the record on appeal, the transcript of the District Court proceedings.

to sustain the judgment. But there is nothing in the *Letulle* case which supports the novel proposition that a question which was *not* raised can be decided by an Appellate Court; and there is nothing in that case to support the revolutionary proposition that the theory adopted by the parties, and the District Court, and the Circuit Court of Appeals on the first appeal, can be altered by that Appellate Court on a second appeal, which is brought to enforce its mandate on the first appeal. Here, all the reasons in support of and in opposition to the original judgment of dismissal of Judge Walker were litigated and decided on the first appeal which our adversary admits "is the law of the case." It is not disputed that the object of the second appeal was to enforce the mandate issued on the first appeal. It certainly is too late on the second appeal to urge a question which was neither raised, litigated, nor decided in the prior proceedings. To concede the respondents' proposition is to render unstable the judgments of our Appellate Courts; indeed, to accede to their proposition is to cast the appellate process into a state of chaos.

Conclusion

The unsoundness of the judgment of the Circuit Court of Appeals now being challenged is highlighted by the feeble defense made in its behalf by the respondents' brief. The importance of the questions raised on this application is attested to by the fact that on both appeals to the Circuit Court of Appeals that court ordered argument before the entire court *en banc*. We respectfully submit that these important and troublesome questions should be set at rest by this Court, and that a Writ of Certiorari be granted.

Respectfully submitted,

ISRAEL B. GREENE,
Of Counsel with Petitioner.

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FILED
APR 6 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1943

No. 850

ORANGE THEATRE CORPORATION

Petitioner

vs.

DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, EMANUEL HERTZIG and HARRY BRANDT

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX

ISRAEL B. GREENE
Of Counsel with Petitioner
1180 Raymond Boulevard
Newark 2, New Jersey

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IN THE

United States Circuit Court of Appeals

For the Third Circuit

No. 8368

ORANGE THEATRE CORPORATION,
Plaintiff-Appellant,

vs.

RAYHERSTZ AMUSEMENT CORPORATION,
Defendant.

Order Directing Reargument Before the Court *En Banc*

Present: BIGGS, JONES and GOODRICH, *Circuit Judges.*

And Now, to wit: October 5, 1943,

It is ORDERED that the above entitled cause be set for reargument before the Court *en banc* on Tuesday October 19th at 10:30 A. M.

October 5, 1943.

By the Court

JOHN BIGGS, JR.
Circuit Judge

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 8368 October Term, 1943

ORANGE THEATRE CORPORATION,
Appellant

vs.

RAYHERSTZ AMUSEMENT CORPORATION, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, EMANUEL HERTZIG and HARRY BRANDT

And afterwards, to wit, the 19th day of October, 1943 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, Honorable Charles Alvin Jones, Honorable Herbert F. Goodrich, and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 10th day of January, 1944, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 8368 October Term, 1943

ORANGE THEATRE CORPORATION,
Appellant

v.

RAYHERSTZ AMUSEMENT CORPORATION, a corporation, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, EMANUEL HERTZIG and HARRY BRANDT

Appeal from the District Court of the United States for the District of New Jersey.

Before BIGGS, MARIS, JONES, GOODRICH and MCLAUGHLIN, *Circuit Judges.*

Opinion of the Court

(Filed January 10, 1944)

By MARIS, *Circuit Judge.*

The plaintiff filed a complaint in the District Court for the District of New Jersey under the Sherman and Clayton Acts (15 U. S. C. A. §§ 1 et seq.) for treble damages and for equitable relief. The suit is against a corporate defendant and five individual defendants, David Weinstock, Benjamin Weinstock, Harry Brandt, J. Joshua Goldberg and Emanuel Hertzig. The three individual de-

fendants first named were served in the Southern District of New York on October 17, 1940 upon process issued out of the District Court for the District of New Jersey and the two individual defendants last named were served in the Eastern District of New York on October 21, 1940. Counsel for the plaintiff and counsel for the individual defendants entered into a stipulation on November 7, 1940 and another on November 22, 1940 purporting to extend their time to answer or otherwise move with respect to the complaint. On November 25, 1940, within the extended period, the five individual defendants filed and served notice of a joint motion to quash the service of process and dismiss the complaint. The district court granted the motion and the plaintiff appealed to this court. Both in the district court and upon appeal in this court the parties treated the motion as raising only the defense of improper venue. We held that the defense of improper venue must be asserted within twenty days after the service of the summons and complaint and that since the motion had not been served within that period and since the stipulations to extend the time were ineffective because not approved by the district court the motion was untimely and the court should not have granted it. 130 F. 2d 185.

Upon remand the district court reinstated the complaint and granted the defendants an extension of time within which to answer or otherwise move with respect to it. The extension was granted under the authority conferred upon the district court by Civil Procedure Rule 6(b) under which the court had ample power, in its discretion, to extend the time for serving a motion or answer. Within the extended time the individual defendants again moved to quash the service of process upon them and to dismiss the complaint. The district court again granted their motion and the appeal now before us followed. Upon this appeal the parties have again treated the motion as raising the question of improper venue.

While the second motion is in substantially the same form as the first, our further study has convinced us that the defense which it seeks to assert is not that of improper venue but rather want of jurisdiction of the court over the persons of the individual defendants. Although this objection was not urged either in the court below or here it is clearly raised in the motion and if sustained it supports the order appealed from. It is accordingly open for our consideration. Helvering v. Gowran, 302 U. S. 238 (1937); Riley Co. v. Commissioner, 311 U. S. 55, 59 (1940).

The motion was

> "For an order dismissing the complaint as to the said defendants and each of them on the ground that, as appears from the petition for process and the return of the United States Marshal with respect to service on each of the said defendants that none of the said defendants was served as required by the General Venue Statute, but, on the contrary, that they and each of them were served without the District of New Jersey, and in the case of the defendants David Weinstock and Benjamin Weinstock in the Southern District of New York, and in the case of the defendants J. Joshua Goldberg and Emanuel Hertzig in the Eastern District of New York and in the case of Harry Brandt in the Southern District of New York, all contrary to the statute and practice and rules of this Court in such case made and provided."

While it will be seen that reference was made in the motion to the general venue statute it is quite clear that this reference was wholly meaningless since the sole grounds alleged in support of the motion relate not to venue but to the service of process, namely that the individual defendants were served outside the District of New Jersey. Thus we see that the objection raised by the motion is based upon the extraterritorial character of the service upon

these defendants and that the motion does not complain of the fact that the suit was brought in a district other than that of which they are inhabitants.

We adhere to the view expressed in our former opinion that if the motion is to be treated as raising merely the defense of improper venue the time within which it should have been served commenced to run from the time of service of the summons and complaint and that the unapproved stipulation did not serve to extend the time. If, however, we treat the motions, as we think we must, as raising the defense of lack of jurisdiction over the persons of the individual defendants rather than the defense of improper venue we are forced to conclude that the individual defendants' original motion was not served out of time. For if the extraterritorial service upon the individual defendants was unauthorized and invalid it did not confer upon the district court the power to adjudicate the controversy between the parties. Munter v. Weil Co., 261 U. S. 276 (1923). The individual defendants were, therefore, entitled to ignore the whole proceeding and subsequently attack any default judgment which might result from it. Butterworth v. Hill, 114 U. S. 128 (1886). Under such circumstances the district court could acquire the power to adjudicate the controversy only if the parties voluntarily appeared. Consequently the failure of the individual defendants to assert the defense of lack of jurisdiction of their persons could not at any time before their voluntary appearance fairly be treated as a waiver of the defense nor could the twenty days' period prescribed by Rule 12 for serving a motion or answer raising the defense commence to run prior to such appearance. The distinction between the defenses of lack of jurisdiction of the person and improper venue was clearly pointed out by Justice Brandeis in Robertson v. Labor Board, 268 U. S. 619, 622, 623 (1925). Compare Butterworth v. Hill, 114 U. S. 128 (1886), with Commercial Ins. Co. v. Stone Co., 278 U. S. 177 (1929). The disposition of the original motion is not now before us. However, since the second motion was also

served timely, i. e., within the time extended by the district court, and since it also raises the defense of want of jurisdiction over the persons of the individual defendants, the merits of that defense are now before us for determination unless the right to assert the defense has been lost to the individual defendants by their voluntary appearance in the district court.

The filing by the individual defendants of the stipulation for the extension of the time for answering or otherwise moving with respect to the complaint amounted to a voluntary appearance in the action which gave the court power to adjudicate the controversy to which they were parties. Placek v. American Life Ins. Co., 288 F. 987 (D. C. Wash., 1923). The question then arises whether by thus voluntarily placing themselves under the court's power the individual defendants lost the right to assert the original lack of jurisdiction over their persons. Prior to the adoption of the Rules of Civil Procedure a voluntary appearance ordinarily had that result. Pollard v. Dwight, 8 U. S. 421 (1808); Toland v. Sprague, 37 U. S. 300, 330 (1838); Kendall v. United States, 37 U. S. 524, 623 (1838). It is true that the federal courts followed the common law practice of permitting a defendant to appear specially for the sole purpose of attacking the jurisdiction without thereby subjecting himself to the power of the court generally. Harkness v. Hyde, 98 U. S. 476 (1879); Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194 (1893). The courts followed this practice because they believed that a sound public policy required them, as a matter of grace, to permit a defendant to test the jurisdiction of the court over him before proceeding to adjudicate his cause. In so doing they were exercising judicial restraint, however, rather than giving recognition to a lack of power over a defendant who voluntarily made a special appearance for such an appearance has been held to be sufficient to give a court general jurisdiction over the defendant if the court's procedural rules so provide. York v. Texas, 137 U. S. 15 (1890).

We think that the rules of Civil Procedure call for the use of similar restraint on the part of the federal courts in the exercise of their power over a defendant who has voluntarily appeared to defend an action against him but who desires also to raise a jurisdictional defense. Under Civil Procedure Rule 12 such a defendant is expressly given the right at his option, to assert by motion before answer or in his answer itself a jurisdictional defense such as that of lack of jurisdiction over his person. The rule states that "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." If he chooses to assert the defense in his answer, rather than by motion, he must include with it all other defenses of every kind, meritorious as well as jurisdictional, which are available to him. It has long been recognized, however, that the filing of an answer to the merits involves an appearance in the action for all purposes. Wetzel & T. Ry. Co. v. Tennis Bros. Co., 145 F. 458 (C.C.A. 4, 1906); Dickey v. Turner, 49 F. 2d 998 (C.C.A. 6, 1931). It will thus be seen that Rule 12 permits a defendant to raise a jurisdictional defense even though his voluntary appearance has already called into existence the potential power of the court to adjudicate the merits of his controversy. The rule requires the court to decide without reference to the voluntary appearance the question of jurisdiction thus raised and, if the question is decided in the defendant's favor, to refrain from further exercising over him the power which his appearance has given it.

It necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, *de bene esse*, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not

thereby be giving up any keys to the courthouse door which he possessed before he came in. This, of course, is not to say that such keys must not be used promptly. If the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself it is by the express terms of paragraph (h) of Civil Procedure Rule 12 to be treated as waived, not because of the defendant's voluntary appearance but because of his failure to assert the defense within the time prescribed by the rules. We conclude that within the time allowed for serving the answer the defendant may assert this defense unless he has waived it by some action other than his voluntary appearance. In so holding we are in accord with the decisions of other courts which have considered the question. Blank v. Bitker, 135 F. 2d 962 (C.C.A. 7 1943); Kaufman v. United States, 35 F. Supp. 900 (D.C. Dist. Col. 1940). Compare Phillips v. Baker, 121 F. 2d 752 (C.C.A. 9, 1941).

We come then to the merits of the motion which raises the question whether the district court acquired jurisdiction of the persons of the individual defendants by service of the summons and complaint upon them outside the District of New Jersey. It has long been held that a federal district court cannot, in the absence of an authorizing statute, issue process for service beyond the limits of the district. Herndon v. Ridgway, 58 U. S. 424 (1854); Harkness v. Hyde, 98 U. S. 476 (1878); Insurance Co. v. Bangs, 103 U. S. 435 (1880); Robertson v. Labor Board, 268 U. S. 619 (1925). By Civil Procedure Rule 4 (f) the old rule was enlarged to the extent of permitting service anywhere within the territorial limits of the state in which the district court is held, but we find no statute applicable to the present proceeding which would authorize the action of the District Court for the District of New Jersey in directing the service of its process in the Southern and Eastern Districts of New York. Section 5 of the Sherman Act (15 U.S.C.A. § 5) and Section 15 of the Clayton Act (15 U.S.C.A. § 25) which do authorize extraterritorial service apply only to suits brought by the government, while

section 12 of the Clayton Act (15 U.S.C.A. § 22) which also authorizes such service applies only to suits against corporations. On the other hand Section 4 of the Clayton Act (15 U.S.C.A. § 15), under which the present suit was brought, while it does authorize suit to be brought in any district where the defendant is found, does not authorize service in a district other than that in which the suit is brought. It was so held by Judge Learned Hand in construing the similar provision contained in Section 7 of the Sherman Act (26 Stat. 210) which was the predecessor of Section 4 of the Clayton Act. Thornburn v. Gates, 225 F. 613 (D.C.N.Y. 1915). We conclude that the district court rightly quashed the service of process upon the individual defendants. We likewise conclude that it was right in dismissing the complaint as to these defendants.

Prior to the adoption of the Rules of Civil Procedure it was held that dismissal of the suit was appropriate under such circumstances. Butterworth v. Hill, 114 U. S. 128 (1885); Munter v. Weil Co., 261 U. S. 276 (1923); Employers Corp. v. Bryant, 299 U. S. 374 (1937). Under the Rules of Civil Procedure a defendant under these circumstances is entitled to dismissal. For if we are to permit a defendant to come voluntarily into court and still raise the defense that his summons to the courthouse was unlawful we must allow him, if he sustains his point, to depart without day through the door which he has thus unlocked. The dismissal of the complaint in such a situation, however, results solely from the lack of jurisdiction of the court and is, therefore, not an adjudication of the merits of the cause of action. Consequently such a dismissal does not prejudice the right of the plaintiff to file another complaint when and if it appears that the court may obtain jurisdiction of the person of the defendant.

The order of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

Judgment of Affirmance

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 8368 October Term, 1943

ORANGE THEATRE CORPORATION,

Appellant

vs.

RAYHERSTZ AMUSEMENT CORPORATION, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, EMANUEL HERTZIG and HARRY BRANDT

Present: BIGGS, MARIS, JONES, GOODRICH and MCLAUGHLIN, *Circuit Judges.*

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of April 26, 1943 of the said District Court in this case be, and the same are hereby affirmed, with costs.

By the Court

MARIS
Circuit Judge

January 10, 1944

Endorsements—

Order Affirming Orders of District Court
Received & Filed Jan. 10, 1944
Wm. P. Rowland, Clerk

Certification

United States of America
Eastern District of Pennsylvania } Set.
Third Judicial Circuit

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third District, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of Orange Theatre Corp., appellant, v. Rayherstz Amusement Corp., et al., No. 8368, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia this 12th day of January in the year of our Lord one thousand nine hundred and forty-four, and of the Independence of the United States the one hundred and sixty-eighth.

Wm. P. Rowland
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.